U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 30 April 2004

Case No. 2003-BLA-176

In the Matter of:
JOHN HENRY SIZEMORE,
Claimant,

v.

SHAMROCK COAL CO., INC.,
Employer,
and
SUN COAL CO., c/o
ACORDIA EMPLOYERS SERVICE,
Carrier,
and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest.

APPEARANCES:
Ms. Monica Rice Smith, Esq. (For Claimant)
Hyden, Kentucky

Ms. Lois A. Kitts, Esq. (For Employer/Carrier)
Pikeville, Kentucky

BEFORE: THOMAS F. PHALEN, JR.
Administrative Law Judge

DECISION AND ORDER - DENIAL OF BENEFITS

This is a decision and order arising out of a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1977, 30 U.S.C. §§ 901-962, ("the Act") and the regulations thereunder, located in Title 20 of the Code of Federal Regulations. Regulation section numbers mentioned in this Decision and Order refer to sections of that Title.[1]

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[1] The Department of Labor amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80, 045-80,107 (2000) (to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). On August 9, 2001, the United States District Court for the District of Columbia issued a Memorandum and Order upholding the validity of the new regulations. All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Procedural History

John Henry Sizemore ("Claimant") filed his initial claim for benefits under the Act on July 31, 1991. (DX 1).[2] On December 30 1991, the Director, Office of Workers' Compensation Programs ("OWCP") denied the claim because the evidence did not establish (1) the existence of pneumoconiosis, (2) that pneumoconiosis was caused at least in part by coal mine employment, and (3) that Claimant was not totally disabled by the disease. (DX 1). Claimant requested a hearing before an Administrative Law Judge ("ALJ"), which was held on October 26, 1993. (DX 1). On June 14, 1994, ALJ Frank D. Marden issued a Decision and Order denying benefits. (DX 1). ALJ Marden found that Claimant did not establish the existence of pneumoconiosis by means of x-ray evidence, biopsy, or the presumptions. (DX 1). However, ALJ Marden did find that Claimant established the existence of pneumoconiosis through narrative medical evidence. (DX 1). ALJ Marden further found that Claimant's pneumoconiosis arose out of his coal mine employment. (DX 1). ALJ Marden determined that Claimant did not establish total disability by means of the pulmonary function tests, arterial blood gas studies, cor pulmonale with right-sided congestive heart failure, or medical opinion evidence. (DX 1). Claimant filed a notice of appeal on July 5, 1994. (DX 1). On March 30, 1995, the Benefits Review Board issued a Decision and Order affirming the denial of benefits. (DX 1).

Claimant filed a duplicate claim for benefits on February 2, 2001. (DX 2). On January 17, 2003, the Director, OWCP, denied the claim because the evidence did not show that Claimant suffered from pneumoconiosis, that pneumoconiosis arose out of his coal mine employment, and that he was totally disabled by pneumoconiosis. (DX 26). On January 24, 2003, Claimant requested a hearing before an ALJ. (DX 27).

On May 6, 2003, this case was referred to the Office of Administrative Law Judges by the Director, OWCP, for a hearing. (DX 31). A formal hearing on this matter was conducted on November 20, 2003, in Hazard, Kentucky, by the undersigned Administrative Law Judge. All parties were afforded the opportunity to call witnesses, and to examine and cross examine witnesses, and to present evidence, as provided in the Act and the above referenced regulations.

ISSUES

The issues in this case are:

1. Whether the claim was timely filed;

2. Whether Claimant has pneumoconiosis as defined by the Act;

3. Whether Claimant's pneumoconiosis arose out of coal mine employment;

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[2] In this Decision, "DX" refers to the Director's Exhibits, "EX" refers to the Employer's Exhibits, "CX" refers to the Claimant's Exhibits, and "Tr." refers to the official transcript of this proceeding.

4. Whether Claimant is totally disabled;

5. Whether Claimant's disability is due to pneumoconiosis;

6. Whether the named employer has secured the payment of benefits; and

7. Whether the evidence establishes a material change in conditions per 20 C.F.R. 725.309.

(DX 31).

Based upon a thorough analysis of the entire record in this case, with due consideration accorded to the arguments of the parties, applicable statutory provisions, regulations, and relevant case law, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Background

Claimant was born on July 4, 1936. (DX 2). He has an eighth grade education. (DX 1, Tr. 13). Claimant married Helen Napier Sizemore on February 2, 1959. (DX 8, Tr. 13-14). Claimant has no other dependents for purposes of augmentation. (DX 2).

The parties stipulated that Claimant worked in the coal mines for thirty years. (DX 31, Tr. 10). Claimant testified that he last worked underground as a general mine foreman. (Tr. 14). Claimant was a working foreman for approximately fifteen years; he relieved other employees for their breaks during this time. (Tr. 15). Claimant testified that he was required to repair equipment and sometimes lift up to 100 pounds. (Tr. 15). Claimant also drove shuttle cars and operated a cutting machine, scoops, miners, and bolting machines. (Tr. 16). All of Claimant's jobs were dusty. (Tr. 16). Claimant worked eight hour shifts. (Tr. 18).

Claimant testified that he has heart problems, breathing problems, arthritis, and a pacemaker. (Tr. 18). Claimant stated that he experiences shortness of breath when walking more than 200 feet up a grade. (Tr. 18). Because of shortness of breath, Claimant is no longer able to hunt, work in the garden, or run a tiller. (Tr. 25-26). Claimant has a daily, productive cough. (Tr. 19). Claimant sleeps on two pillows at night and has episodes of smothering. (Tr. 19-20). Claimant's treating physician is Dr. Baker. (Tr. 21). Claimant uses two inhalers—Flovent and Atrovent—four times a day. (Tr. 22-23). Drs. Rawl and Yalomunski treat Claimant for his heart problems. (Tr. 23). Claimant also takes medication for arthritis. (Tr. 24). Claimant's family doctor, Dr. Rena Corn, prescribed medication for Claimant's high blood pressure. (Tr. 25).

MEDICAL EVIDENCE

X-Ray Reports

Exhibit	Date of X-ray	Date of Reading	Physician/Qualifications	Interpretation
DX 9	5/03/01	05/03/01	Dahhan, B-reader[3]	Negative for pneumoconiosis
DX 10	5/03/01	70/03/01	Wheeler, BCR[4], B-reader	Negative for pneumoconiosis
DX 15	3/21/01	03/21/01	Hussain	3/3, p/t, large opacities "A"
DX 16	3/21/01	03/31/01	Sargent, BCR, B-reader	Unknown[5]
DX 24	3/21/01	11/29/01	Scott, BCR, B-reader	Negative for pneumoconiosis
CX 1	5/03/01	06/09/02	Alexander, BCR, B-reader	2/2, p/q, large opacities "O"
EX 7	9/25/03	11/10/03	Lockey, B-reader	1/1, s/t, large opacities "O"
EX 5	9/25/03	09/30/03	Wiot, B-reader	Negative for pneumoconiosis

PULMONARY FUNCTION STUDIES

Exhibit/ Date	Co-op./ Undst./ Tracings	Age/ Height	FEV_1	FVC	MVV	FEV_1/ FVC	Qualifying Results
DX 15/ 3/21/01	Fair/ Fair/ Yes	64/ 66"[6]	2.78	3.49	123	80%	No
DX 15/ 5/3/01	Poor/ Good/ Yes	64/ 65.35"	1.54 1.16*	2.45 1.77*	19 19*	63% 66%*	Yes Yes
DX 25/ 1/11/02	Good/ Good/ Yes	65/ 65.35"	1.91 2.04*	2.71 2.80*	35 34*	71% 73%*	No No

[3] A "B" reader is a physician who has demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successful completion of an examination conducted by or on behalf of the Department of Health and Human Services. This is a matter of public record at HHS National Institute for Occupational Safety and Health reviewing facility at Morgantown, West Virginia. (42 C.F.R. § 37.5l) Consequently, greater weight is given to a diagnosis by a "B" Reader. *See Blackburn v. Director, OWCP*, 2 B.L.R. 1-153 (1979).

[4] A physician who has been certified in radiology or diagnostic roentgenology by the American Board of Radiology, Inc., or the American Osteopathic Association. *See* 20 C.F.R. § 727.206(b)(2)(III). The qualifications of physicians are a matter of public record at the National Institute of Occupational Safety and Health reviewing facility at Morgantown, West Virginia.

[5] The form used by Dr. Sargent does not contain any information regarding the existence of pneumoconiosis. The form itself is completely blank under sections 2 and 3; only sections 1 and 4 are included on the form. Therefore, I give no probative weight to this x-ray interpretation.

[6] I must resolve the height discrepancy recorded on the pulmonary function tests. *Protopappas v. Director, OWCP*, 6 B.L.R. 1-221 (1983). I find that Claimant's height is 66.1 inches.

EX 5 9/25/03	/ / Yes	67/ 67"	1.46 1.71*	2.68 2.94*	48	54.48% 58.16%*	Yes No

*Results obtained after bronchodilator

ARTERIAL BLOOD GASES

Exhibit	Date	pCO_2	pO_2	Qualifying
DX 9	05/03/01	38.0	75.3	No
DX 9	05/03/01	36.3*	81.6*	No
DX 13	03/21/01	38.6	75.0	No
EX 5	09/25/03	39	71	No

*Results obtained with exercise

Narrative Medical Evidence

Dr. Dahhan examined Claimant on May 3, 2001. (DX 9). Claimant reported a thirty-five year history of underground coal mine employment operating a continuous miner, cutting machine, and shuttle car. Dr. Dahhan noted a smoking history of twenty-three total pack years. Claimant complained of occasional wheeze with no daily cough of sputum production. Claimant reported using two inhalers. Claimant reported dyspnea on exertion but no orthopnea or paroxysmal dyspnea. Dr. Dahhan also noted occasional edema with a history of heart problems, water pills blood pressure pills, Coumadin, and heart medication. On examination, Dr. Dahhan noted good air entry to both lungs with a few expiratory wheezes. Dr. Dahhan found no crepitation or pleural rubs. Dr. Dahhan performed a chest x-ray, which was negative for pneumoconiosis; a pulmonary function test, which was invalid due to poor performance; and an arterial blood gas study, which showed normal values. Dr. Dahhan also reviewed Claimant's medical records from 1991 and 1992. Dr. Dahhan concluded that there was insufficient objective data to justify the existence of coal workers' pneumoconiosis based upon his clinical examination, chest x-ray, pulmonary function study, and prior medical records. Dr. Dahhan stated that there were no objective findings to indicate any pulmonary disability based upon his clinical examination, normal pulmonary function tests, and normal arterial blood gas studies. Dr. Dahhan concluded that Claimant retained the capacity to return to his previous coal mine employment or comparable work. Dr. Dahhan found no evidence of any impairment or disability caused by, contributed to, or aggravated by the inhalation of coal dust. He opined that Claimant's disability was due to his stroke, cardiac arrhythmia, and coronary artery disease. Dr. Dahhan stated that Claimant's smoking history contributed to Claimant's reported symptoms of cough, sputum production, and intermittent wheeze.

There are various Outpatient Progress Notes from Christian Healthcare Services, Inc., included in the record. (DX 10). The progress notes date from March 23, 2003, to August 1991 and cover a wide array of problems including knee pain, dizzy spells, skin lesions, dry scaly skin, abdominal pain, colds, arthritis, back pain, and chest pain. There are also numerous x-ray reports that relate to Claimant's pacemaker and chest pain. There are notations regarding chronic obstructive pulmonary disease and Claimant's smoking history.

Dr. Hussain examined Claimant on March 21, 2001. (DX 12). Dr. Hussain did not note any coal mine employment history. In his medical history, Claimant only reported heart disease and high blood pressure. Dr. Hussain recorded a smoking history of thirty years at the rate of one pack per day. Claimant's chief complaints included daily sputum, dyspnea on walking ten yards, and daily cough. Claimant's physical examination was normal except for rhonchi and crackling noted on auscultation of the chest. Dr. Hussain performed a chest x-ray, which was positive for pneumoconiosis; a pulmonary function test, which showed a moderately severe airway obstruction; an arterial blood gas study, which was within normal limits; and an electrocardiogram ("EKG"), which showed a ventricular pacemaker and arterial fibrillation. Dr. Hussain diagnosed pneumoconiosis and chronic obstructive pulmonary disease caused by coal dust and smoking. He based his diagnosis on x-ray findings, the pulmonary function test, and history of exposure. Dr. Hussain stated that Claimant had a severe impairment caused mainly by pneumoconiosis. He determined that Claimant was totally disabled because of severe dyspnea and pulmonary impairment.

Dr. Lockey examined Claimant on October 20, 2003. (EX 5). Claimant's chief complaint was shortness of breath that began in the early 1980s. Claimant reported shortness of breath on walking up one flight of stairs or one-quarter mile on a flat surface. Claimant stated that he had a ten to fifteen-year history of a cough productive of a small amount of yellow sputum per day and a five-year history of intermittent wheezing in the morning. Dr. Lockey noted that Claimant had a twenty-four pack year smoking history. Dr. Lockey reported Claimant worked in the coal mines from the 1950s until 1991. On examination, Dr. Lockey noted a popping noise at the end of inspiration involving the posterior right lower lung field with scattered rhonchi and rales. He noted more persistent rales in the left lower lung field. Dr. Lockey's final impressions were that Claimant's breathing problems were due to rheumatoid arthritis and bullous emphysema. He stated that Claimant is not capable of performing his normal coal mine employment or similar job tasks in a dust-free environment.

Dr. Fino reviewed Claimant's medical records from 1991 to 2002. (EX 3). Dr. Fino found insufficient objective medical evidence to support a finding of coal workers' pneumoconiosis. He determined that Claimant did not suffer from any respiratory impairment. Although he concluded that Claimant was disabled from returning to his usual coal mine employment or similar work, he opined that the disability was due to significant coronary artery disease

Prior Medical Evidence

I incorporate, as if fully rewritten herein, the chest x-ray interpretations, pulmonary function tests, arterial blood gas studies, and narrative medical reports contained in the prior decisions and orders issued by ALJ Gilday and ALJ Tierney on the dates noted above.

DISCUSSION AND APPLICABLE LAW

Applicable Law

Claimant's claim was made after March 31, 1980, the effective date of Part 718, and must therefore be adjudicated under those regulations. To establish entitlement to benefits under Part 718, Claimant must establish, by a preponderance of the evidence, the following elements:

1. That he suffers from pneumoconiosis;

2. That the pneumoconiosis arose, at least in part, out of coal mine employment;

3. That the claimant is totally disabled; and

4. That the total disability is caused by pneumoconiosis.

See §§ 719.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore*, 9 B.L.R. 1-4, 1-5 (1986); *Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211, 1-212 (1985). Failure to establish any of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 B.L.R. 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 B.L.R. 1-26, 1-27 (1987).

Timeliness

Claims for benefits under the Act are accorded a statutory presumption of timeliness. § 718.308(c). A claim is timely filed if it was filed before three years after a "medical determination of total disability due to pneumoconiosis" is communicated to a miner. § 718.308(a); 30 U.S.C. §932(f). Appellate jurisdiction lies with the Sixth Circuit Court of Appeals since Claimant last engaged in coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 B.L.R. 1-200 (1989) (en banc). The Sixth Circuit has issued three relevant decisions on the application of § 718.308.

In *Sharondale Corp. v. Ross*, 42 F.3d 993 (6th Cir. 1994), the Sixth Circuit held that the time period in which a miner must file for benefits, under § 718.308(a), starts after each denial of a previous claim, provided that the miner works in the coal mines for a substantial period of time after the denial and a new medical opinion of total disability due to pneumoconiosis is communicated. *Ross*, 42 F.3d at 996. Ross, the claimant, was initially denied benefits under the Act in 1981. He began working again as a coal miner before quitting in 1983. He filed a duplicate claim in 1985. Accordingly, the Sixth Circuit found that Ross' claim was timely filed. In *Ross*, the Sixth Circuit explicitly declined to hold that the statute of limitations only applied to the filing of initial claims. *Id.* The Sixth Circuit found it's holding to be dictated by the progressive nature of pneumoconiosis and logic, since it would make no sense to allow serial applications for benefits and then limit the ability to file serial applications to three years. *Id.*

Five years later, the Sixth Circuit again addressed the application of § 718.308 in *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602 (6th Cir. 2001). Beginning in 1979, Kirk filed three claims for benefits, all of which were denied. *Kirk*, 264 F.3d at 604. He filed his fourth duplicate claim in 1992, and was awarded benefits. *Id.* The Sixth Circuit found that Kirk's 1992 claim was timely filed, stating:

> [t]he three-year statute of limitations clock begins to tick the first time that a miner is told by a physician that he is totally disabled by pneumoconiosis. This clock is not stopped by the resolution of the miner's claim or claims, and, pursuant to *Sharondale*, the clock may only be turned back if the miner returns to the mines after a denial of benefits. There is thus a distinction between premature claims that are unsupported by a medical determination, like Kirk's 1979, 1985, and 1988 claims, and those claims that come with or acquire such support. Medically supported claims, even if ultimately deemed "premature" because the weight of the evidence does not support the elements of the miner's claim, are effective to begin the statutory period.

Id. at 608. The Sixth Circuit stated that Kirk's three prior denials do not trigger the statute of limitations because they were premature filings, noting that previous medical opinions did not conclusively opine that Kirk was totally disabled due to pneumoconiosis. Then the Court referenced its unpublished decision in *Clark v. Karst-Robbins Coal Co.*, No. 93-4173, 1994 WL 709288 (6th Cir. 1994), where it rejected a successful state workers' compensation claim that relied upon a finding that the claimant became permanently and totally disabled as the result of the occupational disease of pneumoconiosis as a "medical determination."

The Sixth Circuit addressed the timeliness issue most recently and definitively in reaching their unpublished decision in *Peabody Coal Co. v. Director, OWCP [Dukes]*, 48 Fed.Appx. 140, 2002 WL 31205502 (6th Cir. October 2, 2002)(unpublished). Between 1987 and 1988, Dukes received several opinions from physicians that he was suffering from pneumoconiosis. He filed a claim for benefits under the Act in 1988, which was denied by a Department of Labor claims examiner. Dukes did not appeal and he never returned to coal mining. In 1995 he filed a duplicate claim for benefits, and he was awarded benefits. The Sixth Circuit engaged in a thorough and complete analysis of the three-year statute of limitations, wherein they characterized their holding in *Kirk* as a finding that no "medical determination" exists absent a valid medical opinion, notwithstanding prior knowledge or existence of the disease. *Dukes*, 48 Fed.Appx. at 144. They then held, relying on *Kirk* and paying deference to the remedial intent of Congress in creating the Act, that the three-year statute of limitations applies to subsequent claims. *Id.* at 145. Next, the Sixth Circuit stated that the three-year statute of limitations is not triggered by undiagnosed cases of pneumoconiosis, self-diagnosed cases, and (relying on *Ross*) "all situations in which the miner has filed a claim but has not yet contracted the disease - including claims filed on the basis of a misdiagnosis." *Id.* In light of the denial of Dukes' 1988 claim, the Sixth Circuit found, for legal purposes, that Duke's condition was misdiagnosed. The Sixth Circuit then agreed with and adopted the reasoning behind the Tenth Circuit Court of Appeals' decision that a "final finding by an Office of Workers' Compensation Program adjudicator that the claimant is not totally disabled due to pneumoconiosis repudiates any earlier medical determination to the contrary and renders prior medical advice to the contrary ineffective to trigger the running of the statute of limitations." *Id.*, citing to *Wyoming Fuel Co. v. Director, OWCP [Brandolino]*, 90 F.3d 1502, 1507 (10th Cir.

1996). The Sixth Circuit stated that a misdiagnosis does not equate to a medical determination. *Dukes*, 48 Fed.Appx. at 146. In a restatement of it's holding, the Sixth Circuit stated, "if a miner's claim is ultimately rejected on the basis that he does not have the disease, this finding necessarily renders any prior medical opinion to the contrary invalid, and the miner is handed a clean slate for statute of limitations purposes." *Id.* Effectively, a "proper medical determination" is required to trigger the statute of limitations. *Id*. This holding complies with the recognition of pneumoconiosis as a progressive disease.

After the Sixth Circuit found that a misdiagnosis does not trigger the statute of limitations, it addressed the apparent conflict with its holding in *Kirk*.

In *Kirk*, we stated in dicta that:

> Medically supported claims, even if ultimately deemed "premature" because the weight of the evidence does not support the elements of the miner's claim, are effective to begin the statutory period. Three years after such a determination, a miner who has not subsequently worked in the mines will be unable to file any further claims against his employer, although, of course, he may continue to pursue pending claims.
>
> However, we decided Kirk on the basis that the miner there did not have a medically supported claim. Today, we have carefully considered this issue and hold otherwise.

Id. at 147 (citations omitted)(footnote omitted)(emphasis omitted).

I acknowledge that *Dukes* is not binding precedent, yet I find that the reasoning employed by the Sixth Circuit in *Dukes* to be significantly persuasive regarding the definition of a medically supported claim. The *Dukes* decision was issued after *Kirk* and utilized a much more thorough analysis of § 718.308. The Sixth Circuit's decision in *Dukes* does not reject *Kirk.* Rather, in keeping with the essential holding of *Kirk*, it clarifies the definition of a medically supported claim by finding that a misdiagnosis is not a medically supported claim. It is worthy to note that, regardless of how the Sixth Circuit constructed their application of § 718.308 between *Ross, Kirk,* and *Dukes*, the Court found all three claims to have been timely filed. In so doing, the Sixth Circuit had one eye on the remedial nature of the Act, with the other focusing on the progressive nature of pneumoconiosis.

Since Claimant filed his duplicate claim on February 2, 2001, Shamrock Coal Company, Inc., must adduce sufficient evidence to show that a medical determination of total disability due to pneumoconiosis was communicated to Claimant prior to February 2, 1998, to rebut the presumption of timeliness. There were seven medical opinions regarding total disability before ALJ Marden in 1994. Four opinions, namely those of Drs. Hudson, Lockey, Wicker, and Ankobiah, found that Claimant was able to return to his normal coal mine employment. Dr. Anderson made no specific finding regarding total disability. Dr. Baker equivocally opined that Claimant should not be exposed to coal dust and may have difficulty performing sustained manual labor. Therefore, the only opinion regarding total disability was that of Dr. Myers. Dr. Myer's opinion was discredited because it was against the great weight of the medical evidence and contrary to the findings upon blood gas and pulmonary function testing. Accordingly, since ALJ Marden determined on June 14, 1994, that Claimant had pneumoconiosis but was not totally disabled by the disease, any medical opinion issued prior to June 14, 1994, regarding total disability is rendered invalid and Claimant was handed a "clean slate" for statute of limitations purposes. *Dukes*, 48 Fed. Appx. at 146. ALJ Marden's denial of benefits was affirmed by the Benefits Review Board on March 30, 1995. Under the reasoning of *Dukes*, any medical opinion communicated to Claimant informing him that he was totally disabled due to pneumoconiosis, prior to June 14, 1994, was a misdiagnosis. A misdiagnosis of pneumoconiosis does not trigger the three-year statute of limitations. Since Claimant filed his duplicate claim on February 2, 2001, even if a medical determination of total disability due to pneumoconiosis was communicated to Claimant right after ALJ Marden's denial on June 14, 1994, Claimant's duplicate claim would be timely filed. Therefore, I find that Claimant's February 2, 2001, claim for benefits was filed before three years after a medical determination of total disability due to pneumoconiosis was communicated to him. Claimant's duplicate claim is not barred by the three-year statute of limitations of § 718.308(a).

<u>Duplicate Claim</u>

Claimant filed the present claim on February 2, 2001. His previous claim was denied on March 30, 1995, by the Benefits Review Board. The provisions of § 725.309 apply to new claims that are filed more than one year after a prior denial. Section 725.309 is intended to provide claimant relief from the ordinary principles of *res judicata*, based on the premise that pneumoconiosis is a progressive and irreversible disease. *See Lukman v. Director, OWCP,* 896 F.2d 1248 (10th Cir. 1990); *Orange v. Island Creek Coal Co.*, 786 F.2d 724, 727 (6th Cir. 1986); § 718.201(c) (Dec. 20, 2000). Section 725.309(d) provides that:

> If the earlier miner's claim has been finally decided, the later claim shall also be denied on the grounds of the prior denial, unless the deputy commissioner determines that there has been a material change in conditions or the later claim is a request for modification and the requirements of § 725.310 are met.

The Benefits Review Board defined "material change in conditions" under § 725.309(d) as occurring when a claimant establishes, by a preponderance of the evidence developed subsequent to the prior denial, at least one of the elements of entitlement previously adjudicated against the claimant. *See Allen v. Mead Corp.*, 22 B.L.R. 1-61 (2000). A material change in conditions may only be based upon an element which was previously denied. Caudill v. Arch of Kentucky, Inc., 22 B.L.R. 1-97 (2000) (en banc on recon.) (where Administrative Law Judge found that claimant did not establish pneumoconiosis and did no specifically address total disability, the issue of total disability may not be considered in determining whether the newly submitted evidence is sufficient to establish a material change in conditions). Lay testimony alone is insufficient to establish a material change in conditions. Madden v. Gopher Mining Co., 21 B.L.R. 1-122 (1999).

This matter arises under the jurisdiction of the Sixth Circuit Court of Appeals.[7] In *Tennessee Consolidated Coal Co. v. Director, OWCP, [Kirk]* 262 f.3d 602 (6th Cir. 2001), the Sixth Circuit held that, under *Sharondale Corp. v. Ross*, 42 F.3d 993 (6th Cir. 1994), it is insufficient for the ALJ to merely analyze the newly submitted evidence to determine whether an element previously adjudicated against the claimant has been established. An administrative law judge must also compare the sum of the newly submitted evidence against the sum of the previously submitted evidence to determine whether the new evidence is substantially more supportive of claimant. *Kirk*, 264 F.3d at 609. However, when comparing the newly submitted evidence against the previously submitted evidence, only a substantial difference in the bodies of evidence is required, not a complete absence of evidence at the earlier time. *Id*. At 610. It is legal error for an administrative law judge not to show that there was a worsening of Claimant's condition on the element selected to show a material change.

Claimant initial claim was denied by ALJ Marden, and affirmed by the Benefits Review Board, because he failed to show that he was totally disabled due to pneumoconiosis. Accordingly, in order for Claimant to establish a material change in conditions and prevent his duplicate claim from being dismissed on the basis of the prior denials, he must adduce medical evidence substantially different from the previous evidence to establish that he is totally disabled due to pneumoconiosis.

Total Disability

Claimant must establish a material change in conditions by demonstrating that he is totally disabled under § 718.204(b).[7] Claimant must demonstrate that he is totally disabled from performing his usual coal mine work or comparable work due to pneumoconiosis under one of the five standards of § 718.204(b) or the irrebuttable presumption referred to in § 718.204(b). The Board has held that under Section 718.204(b), all relevant probative evidence, both "like" and "unlike" must be weighed together, regardless of the category or type, in the determination of whether the Claimant is totally disabled. *Shedlock v. Bethlehem Mines Corp.*, 9 B.L.R. 1-195 (1986); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 B.L.R. 1-231 (1987). Claimant must establish this element of entitlement by a preponderance of the evidence. *Gee v. W.G. Moore & Sons*, 9 B.L.R. 1-4 (1986).

Claimant has presented some evidence that he suffers from complicated pneumoconiosis. There were seven new readings of chest x-rays in this case. Dr. Hussain reviewed a chest x-ray and found size "A" large opacities, pneumoconiosis 3/3. However, the remaining doctors found the chest x-rays either negative for pneumoconiosis or negative for complicated pneumoconiosis. A mark of "O" indicates that complicated pneumoconiosis is not present. Therefore, I find that Claimant has not established the existence complicated pneumoconiosis by a preponderance of the evidence. Therefore, the irrebuttable presumption of § 718.304 does not apply.

[7] Appellate jurisdiction with a federal court of appeals lies in the circuit where the miner last engaged in coal mine employment, regardless of the location of the responsible operator. *Shupe v. Director, OWCP*, 12 B.L.R. 1-200 (1989) (en banc). Claimant last engaged in coal mine employment in Kentucky.

Total disability can be shown under § 718.204(b)(2)(i) if the results of pulmonary function studies ("PFT") are equal to or below the values listed in the regulatory tables found at Appendix B to Part 718. The record consists of four newly submitted PFTs conducted on March 21, 2001, May 3, 2001, January 11, 2002, and September 25, 2003. The PFT performed on March 21, 2001, did not produce qualifying values, as the FEV1 and the MVV were higher than the regulatory values for a person whose age was 64 and whose height was 66.1 inches. The PFT performed on May 3, 2001, produced qualifying values with and without the use of a bronchodilator, as the FEV1 and the MVV were lower than the regulatory values for a person whose age was 64 and whose height was 66.1 inches. However, Dr. Dahhan noted that Claimant's cooperation was poor. The PFT performed on January 11, 2002, did not produce qualifying values, as the FEV1 and the MVV were higher than the regulatory values for a person whose age was 64 and whose height was 66.1 inches. Finally, the PFT performed on September 25, 2003, produced qualifying results without the use of a bronchodilator, as the FEV1 and the MVV were lower than the regulatory values for a person whose age was 64 and whose height was 66.1 inches. However, there were no notations regarding Claimant's cooperation or understanding during the PFT. The same PFT produced non-qualifying results with the use of a bronchodilator. Of the four PFTs, two were qualifying and two were non-qualifying. I find that the qualifying PFT performed by Dr. Dahhan does not support a finding of total disability because Claimant's cooperation was poor. Therefore, I find that Claimant has not proven by a preponderance of the evidence that he is totally disabled under § 718.204(b)(2)(i).

Total disability can be demonstrated under § 718.204(b)(2)(ii) by the results of arterial blood gas studies. The record contains three newly submitted arterial blood gas studies, dated March 21, 2001, May 3, 2001, and September 25, 2003. None of these studies produced qualifying values. Therefore, I find that Claimant has not established total disability under § 718.204(b)(2)(ii).

Total disability may also be shown under § 718.204(b)(2)(iii) if the medical evidence indicates that Claimant suffers from cor pulmonale with right-sided congestive heart failure. The newly submitted evidentiary record does not contain any evidence of cor pulmonale with right-sided congestive heart failure. Therefore, I find that Claimant has not established total disability under § 718.204(b)(2)(iii).

Section 718.204(b)(2)(iv) provides for a finding of total disability if a physician, exercising reasoned medical judgment based on medically acceptable clinical or laboratory diagnostic techniques, concludes that Claimant's respiratory or pulmonary condition prevented him from engaging in his usual coal mine employment or comparable gainful employment. Claimant's usual coal mine employment consisted of working as a general mine foreman. He was a working foreman and relieved other workers during their lunch breaks. He worked underground at the face of the mine for eight hour shifts. His responsibilities included driving shuttle cars, operating a cutting machine, scoops, miners, and a bolting machine. At times he was required to lift up to 100 pounds.

The exertional requirements of the claimant's usual coal mine employment must be compared with a physician's assessment of the claimant's respiratory impairment. *Cornett v.*

Benham Coal, Inc., 227 F.3d 569 (6th Cir. 2000). Once it is demonstrated that the miner is unable to perform his usual coal mine work, a *prima facie* finding of total disability is made and the party opposing entitlement bears the burden of going forth with evidence to demonstrate that the miner is able to perform "comparable and gainful work" pursuant to § 718.204(b)(1). *Taylor v. Evans & Gambrel Co.*, 12 B.L.R. 1-83 (1988). Nonrespiratory and nonpulmonary impairments have no bearing on establishing total disability due to pneumoconiosis. § 718.204(a); *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241 (1994). All evidence relevant to the question of total disability due to pneumoconiosis is to be weighed, with the claimant bearing the burden of establishing by a preponderance of the evidence the existence of this element. *Mazgaj v. Valley Camp Coal Co.*, 9 B.L.R. 1-201 (1986).

There are four newly submitted narrative medical reports in the record, as summarized above. Dr. Hussain found that Claimant suffered from pneumoconiosis and a chronic obstructive pulmonary disease caused by coal dust and smoking. He opined that Claimant was totally disabled because of severe dyspnea and a severe pulmonary impairment. Dr. Dahhan concluded that Claimant retained the respiratory capacity to return to his usual coal mine employment. He found that Claimant's disability was due to stroke, cardiac arrhythmia, and coronary artery disease. Although Dr. Lockey found that Claimant was not capable of performing his normal coal mine employment or similar work, he found that Claimant's breathing problems were due to rheumatoid arthritis and bullous emphysema. Finally, Dr. Fino opined that Claimant was totally disabled but that his disability was caused by significant coronary artery disease. Of the four narrative medical opinions, only Dr. Hussain has determined that Claimant is totally disabled due to pneumoconiosis. The remaining three physicians have opined that Claimant's disability is due to other causes. While I find that all of the medical narrative opinions are well-reasoned and well-documented, I find that Claimant has not proven that he is totally disabled due to pneumoconiosis by a preponderance of the evidence. Therefore, I find that Claimant has not established total disability due to pneumoconiosis under Section 718.204(b)(2)(iv).

After considering all evidence like and unlike, I find that Claimant has not established that he is totally disabled due to pneumoconiosis or other respiratory disease. The element of total disability was previously adjudicated against Claimant. Therefore, Claimant has failed to establish a material change in conditions under § 725.309(d).

Entitlement:

Claimant, John Henry Sizemore, has failed to establish a material change in conditions under § 718.3309(d) by a preponderance of the evidence. Claimant has not proven that he is totally disabled due to pneumoconiosis. Therefore, Mr. Sizemore is not entitled to benefits under the Act.

Attorney's Fees

An award of attorney's fees is permitted only in cases in which Claimant is found to be entitled to benefits under the Act. Because benefits are not awarded in this case, the Act prohibits the charging of any fee to the Claimant for the representation and services rendered in pursuit of the claim.

ORDER

IT IS ORDERED that the claim of John Henry Sizemore for benefits under the Act is hereby DENIED.

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THOMAS F. PHALEN, JR.
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 days from the date of this decision, by filing notice of appeal with the Benefits Review Board, P.O. Box 37601, Washington, D.C. 20013- 7601. **A copy of a notice of appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor for Black Lung Benefits, Frances Perkins Building, Room N-2117, 200 Constitution Avenue, NW, Washington, D.C. 20210.**